82-25

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT A. JONES, A MINOR CHILD; BRIDGET JONES, A MINOR CHILD, BY THEIR MOTHER AND NEXT FRIEND, ALBERTINE JONES; BARBARA L. JONES,

Petitioners,

v.

RICHARD S. SCHWEIKER,
SECRETARY OF HEALTH AND HUMAN SERVICES.

MARCIA SIMMS,
A MINOR BY HER NEXT FRIEND,
SHEILA SIMMS,

Petitioners,

v.

RICHARD S. SCHWEIKER,
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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July 2, 1982.

QUESTION PRESENTED

Whether a state intestate succession statute, which has been incorporated by reference into the Social Security Act, may properly form the basis for the denial of Social Security benefits to an illegitimate child where the state statute is clearly invalid under the equal protection clause?

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OPINIONS BELOW

The opinions of the United States District Court for the District of Maryland, both dated November 20, 1981, are not officially reported and are attached hereto as Appendix B and Appendix D. The decision of the United States Court of Appeals for the Fourth Circuit is reported at 668 F.2d 775 (4th Cir. 1981) and is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 30, 1981. [App. A, p. 1a] Petitioners' Petition for Rehearing was denied on April 5, 1982. [App. J., p. 136a] This Petition for a Writ of Certiorari is filed within 90

days of the denial of rehearing pursuant to Rule 20.4 of the Rules of the Supreme Court of the United States and 28 U.S.C. §2101(c).

STATUTES

Section 216(h)(2)(A) of the Social Security Act, 42 U.S.C. §416(h)(2)(A), provides:

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking

intestate personal property as a child or parent shall be deemed such.

STATEMENT OF THE CASE

On August 26, 1977, Sheila Simms applied for Social Security benefits on behalf of her minor daughter, Marcia Simms. This application was for surviving child's benefits under the Social Security Act, and it was based on the Social Security earnings record of Marcia's deceased father, Talmadge Meadows.

Marcia Simms was born on March 5, 1972 and is now ten years old. Her parents, Sheila Simms and Talmadge Meadows, met in November, 1970 in Baltimore, Maryland. At that time, Ms. Simms was 19 years old and was working as a file clerk for an insurance company. Mr. Meadows, then age 22, was domiciled

in West Virginia but was in the United States Army and was stationed at Ft. Holabird, Maryland.

In June, 1971, Ms. Simms became pregnant. Ms. Simms advised Mr. Meadows of her pregnancy, and they began making plans to be married following Mr. Meadows' expected discharge from the Army in August, 1971. Unfortunately, on August 11, 1971, Mr. Meadows was shot and killed while on active duty. At the time of his death, Ms. Simms was six to eight weeks pregnant, and on March 5, 1972, she gave birth to Marcia.

Ms. Simms' application for Social Security benefits was denied throughout the administrative process. The Administrative Law Judge who heard Ms. Simms' administrative appeal found that Talmadge Meadows "was the biological father of 'Marcia.'" [App. G, p. 118a] The Administrative Law Judge concluded,

however, that Marcia was not entitled to benefits, in part, because the intestate succession "law of West Virginia provides that an illegitimate child may inherit intestate from his father only if the parents intermarry." [App. G, p. 121a] Since there was no intermarriage, Marcia did not meet this requirement. [App. G, p. 121a].

The Jones case began on August 26, 1976 when Albertine Jones filed an application for surviving child's benefits on behalf of her minor children, Albert, Bridget, and Barbara Jones. This application was based on the Social Security earnings record of Odes Watson, the deceased father of the Jones children. Barbara, Bridget and Albert Jones were born on July 6, 1959, March 18, 1961 and November 22, 1966, respectively.

Ms. Jones and Mr. Watson had known each other since Ms. Jones was 12 years

old. They lived in the same Mississippi community and started going together in 1958, about a year before Barbara was born. Ms. Jones was, at that time, 22 years old and Mr. Watson was 45 years old. Mr. Watson was married, but had separated from his wife, who had moved to Detroit before he and Ms. Jones met.

In June, 1972, Mr. Watson suffered a head injury while working. He never recovered from this injury. Ms. Jones left Mississippi with her children about a year later in October, 1973, and moved to Baltimore, Maryland. She returned to Mississippi twice in 1974 and visited Mr. Watson each time. Mr. Watson died from a cerebro-vascular accident on April 22, 1975 in Mississippi.

Ms. Jones' application for Social Security benefits was denied throughout the administrative process. The Administrative Law Judge found that Odes

Watson was "the biological father of the children" but denied their claim, in part, because they were "not eligible to inherit the personal property of the wage earner through intestate succession under the laws of Mississippi." [App. F, pp. 99a and 100a].

After exhausting their administrative remedies, Ms. Jones and Ms. Simms, on behalf of their children, each filed actions for judicial review, pursuant to 42 U.S.C. §405(g), in the United States District Court for the District of Maryland. On November 20, 1980, the Honorable Joseph H. Young entered a Memorandum and Order in each case granting Defendant Secretary's Motion for Summary Judgment. [App. B and App. D]. Final judgment was entered in favor of the Secretary on November 24, 1980. [App. H and App. I].

Ms. Simms and Ms. Jones each timely filed an appeal to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals thereafter consolidated the two cases for the purpose of the appeal.

In both the District Court and the Court of Appeals, the Jones children and Marcia Simms argued that they were entitled to Social Security benefits under 42 U.S.C. §416(h)(2)(A). This section of the Act provides that illegitimate children are entitled to Social Security benefits, without any showing of parental support, if they are entitled to inherit their father's personal property according to "such law as would be applied . . . " by the applicable state court. Simms and Jones argued that the state intestate statutes of West Virginia and Mississippi both unconstitutionally discriminated against

illegitimate children. As a result, if their cases were pending in state courts, the state courts would have no alternative but to declare their statutes unconstitutional and permit these children to inherit on the same basis as legitimate children.

Prior to oral argument, the court notified the Attorneys General of Mississippi and West Virginia that the constitutionality of their state statutes had been called into question and invited them to participate in the appeal, pursuant to 28 U.S.C. §2403(b). Both declined to participate in the case. Following argument and briefing by the parties, the Court of Appeals, by a 2-1 majority, affirmed the decision of the District Court and thereby upheld the denial of Social Security benefits to Petitioners. [App. A, p. 1a].

The basis of the Court of Appeals decision was that "such laws as would be applied" did not include the United States Constitution. The court therefore did not determine whether the intestate statutes were constitutional but held that, even if illegitimate children "would qualify as takers in intestacy" because of the constitutionally invalid intestate statute, they would not be entitled to Social Security benefits. [App. A, pp. 28a-29a].

REASONS FOR GRANTING THE WRIT

The Decision Of The Fourth Circuit Conflicts With The Decisions Of Other Federal Courts, Including The Eighth Circuit.

The Fourth Circuit decision in this case directly conflicts with the deci-

sions of the Eighth Circuit in Gross v. Harris, 664 F.2d 667 (8th Cir. 1981), and Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981). It also conflicts with dicta, directly on point, from this Court in Mathews v. Lucas, 427 U.S. 495, 515, n. 18 (1976), and with at least four reported district court cases.

The Court of Appeals for the Eleventh Circuit is now considering a case involving the same issue. Cox v. Harris, 486 F.Supp. 219 (M.D. Ga. 1980), appeal docketed, No. 80-7430 (11th Cir., June 6, 1980). Following a remand, 640 F.2d 832 (5th Cir. 1981), Cox is again before the Court of Appeals and was argued March 16, 1982. The case has now been taken under advisement. Resolution of Cox will almost certainly exacerbate the existing conflict in the circuits, and the Court may wish to defer action

on this petition pending a decision by the Eleventh Circuit.

The conflict in the circuits involves the proper interpretation of §216(h)(2)(A) of the Social Security Act, 42 U.S.C. §416(h)(2)(A). This section provides that illegitimate children are entitled to Social Security survivor's benefits based on their deceased father's earnings record if they would be entitled to inherit their father's property by intestate succession.[1/] See Mathews v. Lucas, 427 U.S. 495, 498-499 (1976) and Jimenez v. Weinberger, 417 U.S. 628, 631, n. 2 (1974).

1/ The child must also meet several other eligibility conditions, including age, marital status and filing requirements. 42 U.S.C. §402(d)(1). The child's deceased father must also have sufficient Social Security earnings to be "insured" at the time of his death. 42 U.S.C. §402(d)(1). None of these eligibility conditions are disputed by the Secretary in this case.

Specifically, the Act requires the Secretary to award Social Security benefits to illegitimate children if the children would inherit according to:

> . . . such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which [the wage earner] . . . was domiciled at the time of his death . . . .

42 U.S.C. §416(h)(2)(A). The basic question presented in this case is whether "such law as would be applied" includes the United States Constitution.

Petitioners' argument, which was rejected by the Fourth Circuit, is very simple. If these cases were probate cases pending in the courts of West Virginia and Mississippi, where the two fathers were domiciled at their death,

the state courts would be required, under the Supremacy Clause, to apply the United States Constitution in determining inheritance rights. Under the statutory law of West Virginia and Mississippi, illegitimate children can only inherit from their father under exceedingly narrow circumstances. These two intestate succession statutes, however, are clearly unconstitutional as applied to illegitimate children under Trimble v. Gordon, 430 U.S. 762 (1977) and Lalli v. Lalli, 439 U.S. 259 (1978).[2/]

2/ The lower courts held that the constitutionality of the state statutes was irrelevant and thus did not reach this issue. The Court of Appeals held that even if the state statutes were invalid, and these illegitimate children could therefore inherit in state courts, they still would not be entitled to Social Security benefits. [App. A, pp. 28a-29a]. Accordingly, this Court should assume, arguendo, that the statutes are in fact constitutionally invalid and simply (fn. cont.)

The courts of West Virginia and Mississippi would therefore have no alternative but to declare their state's intestate succession statute unconstitu-

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fn. 2 cont.

determine whether the Social Security Act requires the application of the Constitution to state intestacy statutes which have been incorporated by reference into the Social Security Act. If the Court determines that the Constitution is applicable, then the case could be remanded to permit the lower courts, in the first instance, to decide whether the statutes are in fact unconstitutional. At the same time, however, it is important to recognize that the state statutes which have stood as an obstacle to the receipt of Social Security benefits in this case are plainly invalid under the equal protection clause. The West Virginia statute, for example, is identical in all material respects to the Illinois statute invalidated by the Court five years ago in Trimble v. Gordon, 430 U.S. 762 (1977). See W. Va. Code Ann., §42-1-6. The Mississippi statute, which was in effect at the time the Jones' claim was adjudicated, was somewhat different but was also clearly unconstitutional in that it operated to totally disinherit illegitimate children in the position of the Jones children. The constitutionality of these two statutes is discussed at length by Judge Bryan in his dissenting opinion in this case. 668 F.2d at 764-766, [App. A, pp. 40a-53a].

tional and permit illegitimate children to inherit on the same basis as legitimate children. Marcia Simms and the Jones children have already established paternity, and would thus be entitled to inherit in state court once the statute was declared invalid. Under §416(h)(2)(A), this ability to inherit entitles them to Social Security surviving child's benefits.

The Fourth Circuit, however, read "such law as would be applied" as excluding the United States Constitution and held that, even assuming the children would qualify for intestate succession in a state court, they were not entitled to Social Security benefits. [App. A, pp. 28a-29a]. This decision conflicts directly with Gross v. Harris,

664 F.2d 667 (8th Cir. 1981), and Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981).3/

In Gross, the Eighth Circuit, in four consolidated cases, considered the Missouri intestate succession statute and its incorporation into the Social Security Act. The court stated: "We

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3/ The decision of the Fourth Circuit also conflicts, in principle, with the Seventh Circuit's decision in Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975). In Eskra, then Circuit Judge Stevens held that a Wisconsin intestate succession statute unconstitutionally discriminated against illegitimate children. This Wisconsin statute had been incorporated into federal law for the purposes of determining intestate succession of Indian land by the Bureau of the Indian Affairs. The court held that the state statute denied illegitimate children equal protection and was therefore invalid. As a consequence, the illegitimate child was held entitled to inherit equally with her legitimate sisters. While this decision is not directly on point, its principle holding, that a state intestate succession statute, which has been incorporated into federal law, must meet constitutional standards before it will be applied in a federal forum, is the same as that presented in this case.

have no difficulty in holding the [Missouri statute] unconstitutional." 664 F.2d at 670. This conclusion led to an award of benefits since the Administrative Law Judge in each of the appeals had previously determined that the child was the biological child of the deceased wage earner. 664 F.2d at 672.

The Eighth Circuit reached the same result in Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981). There, the court dealt with the Arkansas intestate statute in the context of a Social Security claim. Finding that the Arkansas Supreme Court had previously declared its statute unconstitutional under Trimble, the Eighth Circuit found that the illegitimate children, who had established paternity, were entitled to the Social Security benefits they sought.

The Gross and Fulton results are entirely consistent with this Court's dicta in Mathews v. Lucas, 427 U.S. 495 (1976). In Lucas, this Court upheld the constitutionality of the overall Social Security benefit scheme as it relates to illegitimate children. The Court noted that illegitimate children who could inherit under state law are entitled to Social Security benefits. While concluding that this section of the statute was generally reasonable, the Court was careful to note that, if the state law were unconstitutional, it could not stand as an obstacle to the receipt of benefits:

> Appellees do not suggest, and we are unwilling to assume, that discrimination against children in appellees' class in state intestacy laws is constitutionally prohibited, see Labine v. Vincent, 401 U.S. 532 (1971), in which case

> appellees would be made eligible for benefits under §216(h)(2)(A).

427 U.S. at 515, n. 18 (Emphasis supplied).

While this statement is admittedly dicta, its placement in Lucas indicates that this Court did not doubt that §216(h)(2)(A) was subject to the requirements of the Constitution and that illegitimate children could not be denied benefits based on an unconstitutional state intestate succession statute.

In accordance with the Lucas dicta, at least four district courts have held that the Social Security Act requires the application of the Constitution in evaluating inheritance rights and the corresponding entitlement to Social Security benefits. See Allen v. Califano, 456 F.Supp. 168 (D.Md. 1978);

Ramon v. Califano, 493 F.Supp. 158 (W.D. Tex. 1980); White v. Harris, 504 F.Supp. 153 (C.D. Ill. 1980); and Robin v. Schweiker, 532 F.Supp. 677 (D. N.H. 1982).

The Fourth Circuit decision in Jones is at odds with all the above authority. The result is that an award of Social Security benefits will now depend solely on where an illegitimate child resides at the time the application for Social Security is filed. If Marcia Simms lived in Missouri, she would have been awarded benefits even though all the facts, including her father's domicile, were precisely the same. This disparate treatment will not depend on the variations in state intestacy statutes but instead on which rule of law is followed in that federal district.

The conflict in the circuits will likely increase and the resulting unfairness will swell. This is true because at least one state, like West Virginia, maintains a statute which is indistinguishable from the Illinois statute invalidated in Trimble.[4/] It is also true because amendments to the various state intestate statutes are ordinarily not retroactive. See, e.g., Gross v. Harris, 664 F.2d 667 (8th Cir. 1981) and Allen v. Califano, 452 F.Supp. 205 (D. Md. 1978). As a result, superseded intestate statutes will still apply in many Social Security surviving child cases and federal courts will be required to evaluate their constitutionality. See Gross, supra, and Allen, supra. Thus, even recent or

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4/ See R.I. GEN. LAWS, § 31-1-8.

future amendments to state intestacy statutes will not obviate the need for a definitive ruling by the Court.[5/]

The basis on which the Fourth Circuit distinguished Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981), further complicated the conflict in the circuits. In Fulton, the illegitimate child was held to be entitled to Social Security benefits because the Arkansas intestate statute was unconstitutional. The Fourth Circuit viewed Fulton as distinguishable because the Arkansas Supreme Court had already ruled that their intestate succession statute was

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5/ A number of states which had Trimble-type statutes have only recently amended their statutes. See, e.g., ARK. STAT. ANN. §61-141 (amended 1977); CONN. GEN. STAT ANN. §45-274 (amended 1978); G.A. Code §113-904 (amended 1980); KY. REV. STAT. §391.090; N.J. REV. STAT. ANN. §3A:2A-41 (amended 1978); and PENN. CON. STAT. ANN., Title 20, §2107 (amended 1978).

invalid, while neither the courts of Mississippi nor West Virginia had ruled on the question. [App. A, pp. 12a-13a, n. 7]. Apparently the Fourth Circuit in Jones would have reached a different result had a state court in Mississippi or West Virginia previously declared its own statute unconstitutional.

The difficulty with this distinction is that the whole basis of the Fourth Circuit's decision was that Congress intended the Secretary to apply only the state statutory law and not the U.S. Constitution. If this analysis is correct, it should not make any difference that a state court has invalidated its statute on federal constitutional grounds. If, as the Eighth Circuit has concluded, however, the whole law of the state, including the U.S. Constitution, applies, a state court ruling would be

most helpful because it would supply a conclusive indication of the law that "would be applied" by that state court.

Moreover, the Mississippi and West Virginia statutes are so plainly unconstitutional that no reasonable argument can be made in favor of their validity. Had the courts of Mississippi and West Virginia been faced with this question, the result undoubtedly would have been the same as that reached in other states.[6/] See, e.g., Lucas v. Handcock,

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6/ If the state statutes were declared invalid, the state legislature could, of course, pass a constitutionally valid inheritance statute which could exclude many illegitimate children. See Lalli v. Lalli, 439 U.S. 259 (1978). On the other hand, the state legislature could easily enact a statutory scheme which would include all illegitimate children who could establish paternity. This is precisely what happened in Illinois, which, following Trimble, passed a statute which required only proof of paternity. See Cooper v. Harris, 499 F.Supp. 266 (N.D. Ill. 1980). Many other states have also adopted constitutionally valid statutes which require

(fn. cont.)

583 S.W.2d 491 (Ark. 1979), cert. denied, 444 U.S. 942 (1979), and Succession of Brown, 388 So.2d 1151 (La. 1980). In such states, it is hard to conceive of a justification for applying the invalidated statute to a Social Security claim. It is equally hard to conceive of a reason for conditioning Marcia's and the Jones children's rights to federal Social Security benefits on whether other children have successfully

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fn. 6 cont.

only proof of paternity to permit inheritance. See, e.g., DEL. CODE, Title 12, §508; FLA. STAT. ANN., Title 41, §732.108; MASS. GEN. LAWS ANN., Ch. 190, §7 (West) N.M. STAT. ANN., §45-2-109; ARIZ. REV. STAT., §14-2109; IDAHO CODE, §15-2-109; NEB. REV. STAT., §30-2309; ALASKA STAT. §13.11.045; ME. REV. STAT. Tit. 18-A, §2-109; PA. CONS. STAT. ANN., Title 20, §2107; UTAH CODE ANN., §75-2-109. Some of these statutes require "clear and convincing" evidence while others demand only a preponderance. This is not a material difference in this case since Marcia and the Jones children have already established paternity to the satisfaction of the Secretary.

challenged a state statute in a probate case.

Under the Social Security Act, the test is not whether the state statute has been invalidated but rather whether a state court would invalidate the statute if the question were presented. Judge Bryan in his dissenting opinion in Jones explained this point:

> At the same time, it must be understood that our role in interpreting the State laws incorporated into the Act is a distinctly Federal one. While the rule of decision originates in the States, and while we are bound by their interpretations of who can and cannot inherit in intestacy, we nevertheless sit as a Federal court reviewing the actions of the Secretary of Health and Human Services, a Federal official, and therefore render a Federal decision . . . . [O]ur mission is to determine, solely for purposes of the Social Security Act, whether a State court would decide if these plaintiffs would be entitled to

> share in the inheritance of their fathers' intestate personalty.

688 F.2d at 776, (Footnotes omitted). [App. A., pp. 36a-37a].

The majority's contrary view in this case means that illegitimate children are penalized, in the context of federal Social Security benefits, because the states of West Virginia and Mississippi maintained clearly invalid statutes for years after the Trimble decision. Had either legislature promptly passed a constitutionally sufficient statute, both children could have received Social Security benefits.

The experience in Mississippi convincingly demonstrates this point. The Mississippi intestate succession statute which was in effect at the time the Jones children were denied benefits unconstitutionally discriminated against

illegitimate children and was therefore invalid. Mississippi, however, recently amended its statute, presumably in response to decisions of this Court. MISS. CODE ANN. §91-1-15. The new, constitutionally valid statute permits illegitimate children to inherit on the same basis as legitimate children, requiring only that paternity be established by clear and convincing evidence.[7/] Had this Mississippi statute

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7/ The Mississippi amendment was not effective until July 1, 1981, after the Jones case was briefed and argued in the Court of Appeals. Neither the Court of Appeals nor the Secretary ever determined whether this amendment would entitle the Jones children to inherit in Mississippi and thus to receive Social Security benefits. The general rule is that courts should apply the law that currently exists, Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974), and the amendment itself is expressly retroactive. MISS.. CODE ANN. §91-1-15(2)(C)(ii). A determination under this amendment may well avoid the necessity of deciding the constitutional issue, at least regarding the Jones children's claim. Thus, regardless of the (fn. cont.)

been enacted earlier, the Jones children would have already received the Social Security benefits they now seek.

The end result of the Fourth Circuit's decision in these cases is that Marcia Simms and the Jones children have been denied federal Social Security benefits, in a federal forum, on the basis of a clearly unconstitutional state statute. Had the state statutes either been challenged in a state forum or promptly amended by the state legislature following Trimble, a different

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fn. 7 cont.

ultimate disposition of this case, the Jones Petitioners request the Court to at least grant certiorari for the purpose of remanding their cases for a determination of eligibility under the new statute. If certiorari is denied entirely, the Jones children may never be able to successfully reapply for benefits due to res judicata. See McGowen v. Harris, 666 F.2d 60 (4th Cir. 1981). This approach would not affect the Petition of Marcia Simms because West Virginia has not enacted a similar statute.

result would have been reached in these cases.

Neither the Social Security Act nor common sense dictates that the outcome of a federal benefit determination depend on whether a state legislature has revised a clearly unconstitutional statute or on whether a state court has had the opportunity to adjudicate the constitutionality of the state statute.

CONCLUSION

For the foregoing reasons, Petitioners urge the Court to grant certiorari in this case.

Respectfully submitted:

Dennis W. Carroll
Eileen Franch

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1080

Albert A. Jones, a minor child;
Bridget Jones, a minor child,
by their mother and next friend,
Albertine Jones; Barbara L. Jones,

Appellants,

v.

Richard S. Schweiker, Secretary
of Human and Health Services,

Appellee.

No. 81-1132

Marcia Simms, a minor by her
next friend, Sheila Simms,

Appellant,

v.

Richard S. Schweiker, Secretary,
Department of Health and Human
Services,

Appellee.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued June 2, 1981
Decided December 30, 1981

Before BRYAN, Senior Circuit Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

MURNAGHAN, Circuit Judge:

The Social Security Act provides monthly benefits to minor children of deceased Social Security wage earners, if they qualify, under the statutory definition, as dependents.[1] Children

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1 42 U.S.C. § 402(d) entitles every child to benefits, assuming the child meets certain requirements not at issue here, e.g. as to age and marital statuts, and, additionally, was dependent on a deceased wage earner at the time of his death. 42 U.S.C. § 402(d)(3) deems a child dependent unless the insured individual wage earner was not living with or contributing to the support of the child and the child is not the legitimate or adopted child of the wage earner. A child fitting the definition of 42 U.S.C. § 416(h) (2)(B) or § 416(h)(3) is deemed legitimate. "Additionally, any child who qualifies under § 416(h) (2)(A) . . . is considered legitimate . . .and thus dependent." Mathews v. Lucas, 427 U.S. 495, 499 n.2 (1976).

whose parents were married to one another are automatically entitled to Surviving Child's benefits upon proof of paternity (or of maternity. The two cases here considered together concerned deceased wage-earning fathers.) Children whose parentage is not so formally established, however, must meet one or another additional test.

Two of the ways such sons and daughters can establish entitlement to the benefits are (a) by proving that their father was "contributing to [their] support" at the time of his death, 42 U.S.C. § 416(h)(3)(C)(ii), or (b) by establishing, "according to such law as would be applied in determining the devolution of intestate personal property by the Courts of the State in which [the wage earner] was domiciled at

the time of his death," that they "would have the same status relative to taking intestate personal property as a [legitimate] child . . . ." 42 U.S.C. § 416 (h)(2)(A). Those two ways are asserted by the claimants here. No contention is raised that, for purposes of § 416(h)(3)(C)(ii), the wage earners were living with the respective claimants.

The appellants are children who were denied surviving children's benefits under the Social Security Act after their respective fathers died.[2] The Secretary made, in each case, a finding, not disputed on appeal, that the insured individual was, indeed, the father of the child or children. The fathers and mothers never married one another. The

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2 Marcia Simms in one of the cases; Albert, Bridget and Barbara Jones in the other.

father never, in either case, gave written acknowledgment of paternity. The questions presented, therefore, are restricted to whether dependency has been established in the case of each child in either of the two ways asserted.

The two families of surviving children each contend that the Secretary's decision that their respective fathers were not contributing to their support at death was not supported by substantial evidence. In the alternative, they contend that the intestate succession statutes of both West Virginia and Mississippi are unconstitutional[3] as applied to illegitimate

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3 As the language of both the West Virginia and Mississippi statutes compels, the claimants acknowledge that the statutes would not, if constitutional as drawn, confer intestate taker status on any of them.

children, that the respective state courts would be bound so to find, and further to find that, for reasons of equal protection, they were consequently entitled to inherit by intestate succession, and that, therefore, the Secretary erred in not awarding benefits under § 416(h)(2)(A).

I.

First we take up the Secretary's determination in each case that the children's fathers were not contributing to their support at death.

Appellant Marcia Simms was born on March 5, 1972. Her parents, Sheila Simms and Talmadge Meadows, met in November 1970. Unfortunately, six to eight weeks after Marcia was conceived, Meadows was killed while on active duty

in the military.[4] Subsequently, on August 26, 1977, Marcia's mother applied for surviving child's benefits. Although the administrative law judge determined that Meadows fathered Marcia, he also concluded that Meadows was not contributing to Marcia's support within the meaning of § 416(h)(3)(C)(ii). The determination is supported by substantial evidence.[5]

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4 Although Meadows died in Maryland, the Secretary determined that, at the time of his death, he was domiciled in West Virginia.

5 We recognize that the support issue is complicated in Marcia's case by the fact that Marcia was not born until seven months after Meadows' death. The proper test of "support" in such a case is whether contributions are regular and substantial in relation to [1] the wage earner's income and [2] the [unborn] child's needs" at the time of the wage earner's death. [Arilla] Jones v. Harris, 629 F.2d (fn. cont.)

Appellants Albert, Bridget and Barbara Jones are the children of Albertine Jones and Odes Watson. Although Watson was married to (but separated from) another woman, the Secretary specifically found that Watson was the father of the Jones children. Odes Watson died in Mississippi in 1975, and the children applied for benefits on

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fn. 5 cont.

334 (4th Cir. 1980). See also Adams v. Weinberger, 521 F.2d 656, 660 (2d Cir. 1975). Here, the Secretary found that the $10-15 per month out of a $250 month salary that Meadows gave Sheila Simms for some months prior to conception was a gift to the mother, and was not made in anticipation of a possible pregnancy nor in light of the actual pregnancy. Thus, since the Secretary's finding that the contributions were not made with an eye to Meadow's responsibility to the unborn child is supported in the record, the second prong of the [Arilla] Jones test was not met.

August 26, 1976. Between 1959, when the first child was born, and 1972, when Watson suffered a disabling accident, the Secretary found that Watson's contributions to the children's support were sporadic and not in consideration of being regular support payments. Although we appreciate the strength of the testimony to the contrary, the Secretary's conclusion that Watson was not contributing to the support of the Jones children within the meaning of the Social Security Act is supported by substantial evidence and so we affirm that conclusion.

II.

We turn, therefore, to the contention that the Secretary erred as a

matter of law when he refused benefits under 42 U.S.C. § 416(h)(2)(A).[6] Section 416(h)(2)(A) requires the Secretary to

> apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State . . . in which the [the wage earner] . . . was domiciled at the time of his death. . . .

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6 Appellants couch their challenge in terms of the Social Security Act's being unconstitutional under the Fifth Amendment to the extent it incorporates unconstitutional state law. However, Lalli v. Lalli, 439 U.S. 259 (1978), undermines any contention that the social security statutory scheme for surviving children's benefits is unconstitutional under the Fifth Amendment. The argument, properly, should have been phrased in terms of whether the Secretary, in reading and applying the West Virginia and Mississippi law, should have determined that tailoring of that law to satisfy constitutional failings amounted to an amendment, which he was bound to follow.

The applicable domiciles, the domiciles of the decedents, are West Virginia (Meadows) and Mississippi (Watson). Each state has a statute which precludes illegitimate children from inheriting from their father, unless certain legitimating or regularizing action has been taken. According to appellants, each statute is unconstitutional because it denies equal protection and, therefore, since each child would, as a consequence of the constitutional defect, be eligible to inherit from his or her father, the Secretary erred by not applying the law acknowledging the force of the constitutional imperative, and granting benefits.[7]

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7 The argument principally derives from a dictum in Mathews v. Lucas, 427 U.S. 495, 515 n.18 (fn. cont.)

Whether the West Virginia and Mississippi statutes are unconstitutional and whether their deficiencies

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7 (Cont'd)

(1976) ("Appellees do not suggest, and we are unwilling to assume, that discrimination against children in appellees' class in state intestacy laws is constitutionally prohibited, see Labine v. Vincent, 401 U.S. 532 (1971), in which case appellees would be made eligible for benefits under § 216(h)(2)(A).").

The recent decision in Fulton v. Harris, ___ F.2d ___ (8th Cir., Sept. 15, 1981, # 80-1887) simply assumes, without discussion, that unconstitutionality under the rationale of Trimble v. Gordon, supra, would compel the result for which appellants argue. It involved a distinguishable set of circumstances in that the Arkansas court had tailored the intestacy statute of that state to allow inheritance by any intestate taker regardless of legitimacy or illegitimacy, applying the tailored statute prospectively only. We have no comparable declaration by

would, on equal protection grounds, compel the equation of appellants to legitimate children in their respective states, for purposes of intestate succession are tangled questions. Their resolution would require a delicate balancing act applied to several Supreme Court decisions, rendered by a badly divided Court, with results apparently depending on extremely slight factual differences:

Trimble v. Gordon, 430 U.S. 762 (1977 (5-4)

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7 (Cont'd)

an agency of the state of the policy of Mississippi or of West Virginia.

In all events, the court, apparently not having been presented with the legal theory on which we have resolved the case, provided no authority, one way or the other, on what, to us, is the central and controlling issues.

Lalli v. Lalli, 439 U.S. 259 (1978) (5-4)

Labine v. Vincent, 401 U.S. 532 (1971) (5-4)

We have no occasion, however, to climb out on that high wire for we are compelled to conclude that, even assuming that the West Virginia and Mississippi acts are unconstitutional in the way that appellants contend, nevertheless appellants do not satisfy the dependency requirement under the Social Security Act.

We are not unaware that at least three lower courts have followed a route which, once there has been a decision that the intestate succession act is unconstitutional as applied to excluded children of unwed parents, leads to an award of benefits on the theory that 42 U.S.C. § 416(h)(2)(A) has been satisfied. Allen v. Califano, 456 F. Supp.

168 (D. Md. 1978) (intestacy statutes of Maryland and Pennsylvania); Ramon v. Califano, 493 F. Supp. 158 (W.D. Tex. 1980) (Texas act); White v. Harris, 504 F. Supp. 153 (C.D. Ill. 1980) (Missouri).[8] It was entirely reasonable for the district courts so to have concluded in view of the dictum in Mathews v. Lucas, 427 U.S. 495, 515 n.18 (1976) stating that eligibility would be established under § 416 (h)(2)(A) if the state intestacy succession act were held to be discriminatory, and, therefore, unconstitutional.

We find it inexplicable and inexcusable that the Government would not cite, even to attempt to distinguish, those three cases in its Brief. It is

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8 See also Fulton v. Harris, supra (Arkansas).

good luck, rather than management on the Government's part, that we have determined that the Supreme Court's dictum in Mathews v. Lucas does not, in fact, constitute the planks for the bridge's roadway which it, superficially, appears to do.

That is so because it must be taken into account that the question arises, in the instant case, not directly under a state intestate succession law, but rather under the Federal social security legislation. The Federal act has, in effect, incorporated each state statute by reference, pro tanto, in defining eligibility for benefits. Less than a year before Trimble v. Gordon was decided, on April 26, 1977, the Supreme Court on June 29, 1976 handed down Mathews v. Lucas, 427 U.S. 495 (1976). Membership in the Court did not change

in the interval. Yet 6-3, the Court upheld treatment of a child born out of wedlock less favorably than those whose parents had regularized their relationships for purposes of determining whether they met the "dependency" requirements of the social security act. It was held to be proper, or at least not impermissibly discriminatory, to condition entitlement upon "dependency at the time of death." 427 U.S. at 507.

The justification was found to be administrative convenience, which took tangible form in "readily documented facts, such as legitimate birth, or existence of a support order or paternity decree, which could be relied upon to indicate the likelihood of continued actual dependency," Id. at 509. The Court opined:

> Congress was able to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable. Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny.

Id. at 509.

Reflection therefore suggests:

1. Acceptable proofs of dependency such as inadvertently invalid marriage,[9] written acknowledgement by the parent,[10]

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9 That constitutes sufficient proof of dependency for social security act purposes. 42 U.S.A. § 416(h)(2)(B).

10 Likewise, 42 U.S.C. § 416(3)(C)(i)(I).

support order,[11] paternity decree,[12] contribution to support[13] and a common residence in the same household[14] have an ante litem motam aspect which cloaks them with an authenticity markedly greater than when circumstances arising only subsequent to the insured individuals death are advanced as reasons to qualify children of unwed parents for benefits.[15]

2. The social security act accepts many reasonable methods of proof of

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11 See 42 U.S.C. § 416(3)(C)(i)(III).

12 See 42 U.S.C. § 416(3)(C)(i)(II).

13 See 42 U.S.C. § 416(3)(C)(ii).

14 See 42 U.S.C. § 416(3)(C)(ii).

15 The large significance of the fact that the father, during his lifetime, had taken an unambiguous step to acknowledge paternity is demonstrated in Jimenez v. Weinberger, 417 U.S. 628 (1974).

dependency directed to matters occuring in the lifetime of the parent. The whole thrust of the act is to confer the benefits of legitimacy on any child found to be dependent. See 42 U.S.C. § 402(d)(3).

3. Adoption of 42 U.S.C § 416(h)(2)(A) served to extend the ways to establish dependency even to an event arising after the parent's death, the qualification as an intestate taker,[16] where the state law affirmatively showed that the legislature had concluded that there were factors making a dependency

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16 Post death in application, nevertheless, the insured individual is (somewhat artificially) presumed to have known during his life that the child would inherit and yet left things that way, signifying his satisfaction.

relationship probable, despite the absence of the regularizing aspects of marriage of the parents or other events linking the child to the parent. See Mathews v. Lucas, 427 U.S. at 514-15:

> Similarly, we think, where the state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death. For in its embodiment of the popular view within the jurisdiction of how a parent would have his property devolve among his children in the event of death, without specific directions, such legislation also reflects to some degree the popular conception within the jurisdiction of the felt parental obligation to such an "illegitimate child" in other circumstances, and thus something of the likelihood of actual parental support during, as well as after, life.

4. The West Virginia and Mississippi statutory language, each respectively incorporated by reference into the social security act, concedely made no value judgement that, in "the popular view within the jurisdiction," someone in the situation of Simms should be deemed a dependent of Meadows or persons occupying the position of the Joneses should be considered dependents of Watson. Indeed the exact contrary is true. Should we knock out the statutes, in order to void the discrimination, it would be for federal constitutional reasons, and not affect the intent of the West Virginia and Mississippi legislatures as to what would constitute dependency or its equivalent.[17] Under

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17 Contrast Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975) (Stevens, (fn. cont.)

the argument of appellants, incorporation by reference here would have to extend to adoption not of the state

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17 (Cont'd)

J.). There the intendment of Congress was to achieve exactly the same treatment for an intestate taker from a Wisconsin Indian that an intestate taker would receive from a non-Indian under the Wisconsin statute. The situation, therefore, is compellingly different. Congress obviously desired and expected exactly the same result under two interrelated intestate succession schemes. Hence, the unconstitutionality which led to substitution of a meaning and effect not intended by the Wisconsin legislature was to be given force in order to maintain parity.

In the instant case, however, Congress intended to apply the West Virginia statute and the Mississippi statute to the extent that each revealed an additional grounds for eligibility intended by the legislature. It was not the purpose of the adoption in the social security act of the provisions of the law which West Virginia courts or Mississippi courts would apply

(fn. cont.)

statutory language, but to an adoption of a partial deletion of such language.

5. The question, therefore, becomes whether "such law as would be applied" in § 416(h)(2)(A) means (a) all law, including that emanating from federal, constitutional, non-state sources, or (b) only law derived from state legislative enactments (or conceivably from the state's common law).

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17 (Cont'd)

to abide by imperatives, federal and constitutional in nature, which would nullify and contradict the law the West Virginia legislature and the Mississippi legislature wanted to make applicable. To do so would confer eligibility beyond the point to which the two legislatures meant to go. The fact that, for equal protection reasons, the result for intestacy law purposes went further than the legislatures intended was not a reason to conclude that Congress meant to go further than the West Virginia and Mississippi legislatures wished to go.

It is obvious that only the latter was intended by Congress. The situation is akin to the commonly encountered question of whether "day" means a twenty-four hour period or only the time elapsed between sunup and nightfall. Cf. 42 U.S.C. § 416(h)(1)(A), where, with respect to establishing dependency for a spouse, the reference is first to "if the courts of the State . . . would find that such applicant and such insured individual were validly married." The alternative created for a case where the state court would not so find is "if such applicant would, under the laws applied by such courts, in determining the devolution of intestate personal property, have the same status . . . as a wife, husband, widow or widower. . . ."

The expression of an intended identify in scope of what a state court,

applying state law, would find, and what law the state courts would apply seems apparent. Coupling that indication of meaning for the essentially same language elsewhere in the social security act with the congressional purpose to adopt "the popular conception within the jurisdiction," the conclusion is inescapable that § 416(h)(2)(A) does not purport to pick up involuntary modifications in the West Virginia and the Mississippi legislation, unintended by each of the state legislatures, but compelled by the federal constitution.

6. Alternatively, even if we were to hold that literal application of such West Virginia law "as would be applied in determining the devolution of intestate personal property" would lead to a determination that Simms was entitled to share in Meadows' intestate estate (and

pari passu that the Joneses, under Mississippi law, were entitled to a share of the Watson intestate estate), the doing so would not in any way achieve the purposes which the incorporation by reference into the social security act of the West Virginia and Mississippi probate statutes was designed to serve. Cessante ratione cessat ipsa lex. Cf. Boyter v. Commissioner of Internal Revenue, ____ F.2d ____ (4th Cir., Dec. , 1981, # 80-1792) where we refused to apply literally the language of a statute "because the transaction upon its face lies outside the plan intent of the statute." (Quoting with approval Gregory v. Helvering, 293 U.S. 465 (1935)).

7. Thus, we conclude that Simms and the Joneses do not qualify as dependents under § 416(h)(2)(A), even if they

would qualify as takers in intestacy despite the West Virginia and Mississippi statutes to the contrary.

8. We are consequently spared another potentially thorny question. If Simms' position, for example, were sound, she would have established entitlement under the social security act on the basis of parentage alone. For her, and any other child claiming under a West Virginia decedent and presumably under Illinois (Trimble), Maryland (Allen), Missouri (White), Pennsylvania (Allen) and Texas (Ramon) decedents as well, parentage alone would make them intestate takers. The need to prove dependency would evaporate. What constitutional basis would then exist for continuing the dependency requirement for cases involving deceased wage earners domiciled in the other 44 States, the District of Columbia, etc.? Might not

the equal protection component of the Fifth Amendment be violated?

Ensminger v. C.I.R., 610 F.2d 189, 191 (4th Cir. 1979) suggests that variance in treatment, based on differences in the laws of the several states is constitutionally permissible because of the "deference Congress has demonstrated for state laws" and sensitivity to such "intimate and personal relationships as the state in which they reside treats them." But that assumes valid state laws. It is of doubtful constitutionality to permit variances in the application of nationwide social security laws favoring intestate takers of decedents domiciled in states solely because those states failed to pass constitutional laws. Care in draftsmanship should not permit exclusion from benefits of some children whose parent died in New York,

its intestacy laws passing muster under Lalli, while those very benefits are permitted for the child of a West Virginia decedent, otherwise in identically the same position as the New York counterpart. That would create a reward for a bad statute.

We do not have to decide that issue. Nevertheless, avoidance of it amounts to another reason reinforcing the correctness of our decision that, as a matter of statutory interpretation, § 416(h)(2)(A) has not established dependency for Marcia Simms or for the Joneses.

THE JUDGMENTS AND AFFIRMED.

BRYAN, Senior Circuit Judge, dissenting:

The issue in these appeals is whether the "dependency" requirement of § 202(d) of the Social Security Act, 42 U.S.C. §402(d) (1976), has been met by the several claimants who are parties to these two actions. Regrettably, the majority misconstrues the requirements imposed by the Act, and, in doing so, denies benefits to four minor children, all of whom are conceded to be the natural, albeit illegitimate, children of Odes Watson or Talmadge Meadows, both covered wage earners. What the Court fails to recognize is that "visiting this condemnation on the head of an infant is illogical and unjust." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). Finding this result unsupported in law and unconscionable in fact, I dissent.

I

Title II of the Social Security Act of 1935, as amended, (Act) 42 U.S.C. § 401 et seq. (1976), authorizes the payment of benefits to covered wage earners, or their dependents, on account of the death, disability, or old age of the insured individual. A brief survey of the statutory provisions quickly reveals, however, that "dependency," as used in the Act, is a term of art. One may be a "dependent" only if one is the spouse,[1] parent,[2] or child[3] of the insured individual. Others, while they actually may have been dependent in a real economic sense, nonetheless do not qualify for benefits.

1. 42 U.S.C. §§ 402(b), 402(c), 402(e), 402(f) (1976).

2. Id. §§402(g), 402(h).

3. Id. §402(d).

Moreover, the class of children who are deemed "dependent" upon the insured individual is not necessarily identical to those who actually are dependent. Instead, for reasons of administrative convenience, Congress has established a series of alternative tests, satisfaction of any one of which automatically results in a finding of dependency. What the majority overlooks, however, is that six of these seven tests, including § 216(h)(2)(A), the key provision in issue here, do not contain any requirement that the applicant-child actually have been supported by the deceased parent.

This point, while basic, is crucial to an understanding of the Court's error today. Instead of determining squarely whether the applicants qualify under § 216(h)(2)(A), the Court mistakenly

implies that an actual showing of dependency is necessary to qualify for survivors' benefits under this provision. See Opinion of the Court, supra, at 4, 8, 12-15, 17-18. Section 216(h)(2)(A), however, like all but one other test conceived by Congress for measuring "dependency" requires no such showing on its face, and to my knowledge, has never before been so construed by any court.

In pertinent part, this provision states:

> In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual . . . was domiciled at the time of his death. . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child shall be deemed such.

42 U.S.C. § 416(h)(2)(A)(1976). Although its legislative history is sparse, it appears that Congress concluded that this provision, requiring reference to State laws of intestate succession, was the most advisable method by which the Secretary could determined who was a child. Since family status and the legal effect of family relationships traditionally have been the province of the States, it follows that deference to State rules of decision would be more sensible than an effort to develop a uniform Federal rule.

At the same time, it must be understood that our role in interpreting the State laws incorporated into the Act is a distinctly Federal one. While the rule of decision originates in the States, and while we are bound by their interpretations of who can and cannot

inherit in intestacy,[4] we nevertheless sit as a Federal court reviewing the actions of the Secretary of Health and Human Services, a Federal official, and therefore render a Federal decision.[5]

4. It should be noted, however, that where, as here, State law is incorporated so as to supply a Federal rule of decision, Federal courts are bound by the State rule, or the State interpretation, only "so long as it is plain . . . that the State rules do not effect a discrimination against the Government, or patently run counter to the terms of the Federal legislation." Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204, 210 (1946). As discussed in Part III, infra, I believe that the Court's holding foreclosing consideration of the constitutionality of the State statutes is inimical to the plain Federal policy embodied in the Act.

5. In Kasey v. Richardson, 462 F.2d 757 (4th Cir. 1972), we made this point convincingly when we noted that the Secretary is not bound, strictly speaking, by a State court decision expressly holding that an illegitimate child was entitled to inherit property from her putative father. Id. at 761. It is the Secretary's duty under § 216(h)(2) (A) to compile a record and make an independent determination of the

(fn. cont.)

Our constructions of the State laws, accordingly, have no effect on whether a child actually is entitled to inherit his father's intestate personal property. Rather, our mission is to determine, solely for purposes of the Social Security Act, whether a State court would decide if these plaintiffs would be entitled to share in the inheritance of their fathers' intestate personalty.

In this context, finally, the Court today seems to overlook that not only we, as a Federal Court, but also the courts of Mississippi and West Virginia

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5 (Cont'd)

substance of the State law as it would be construed in the State courts. Still, the Secretary cannot ignore compelling evidence which formed the basis of the State decision, at least provided that such evidence properly was before the Secretary, and otherwise was uncontradicted.

are bound by the Supremacy Clause, see U.S. Const. art. 6, which requires the Constitution to take precedence over all laws, Federal and State. Thus a State court, construing its intestate succession statute, must consider whether its law violated the Equal Protection Clause of the Fourteenth Amendment and if it finds its law to be repugnant to the Constitution, then it may not let it remain as an obstable to the children's inheritance. In short, if the State court must determine that its law is unconstitutional, it must permit the illegitimate children to inherit in the same say as legitimate children.[6]

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6. This is not to say, of course, that the State may not then amend its law to make it consistent with the Constitution. Moreover, in doing so, the State effectively may deny some children the right to inherit if they cannot meet the new, constitutional burden imposed on (fn. cont.)

II

Approaching the instant controversy in this light, I am convinced that the laws of Mississippi[7] and West Virginia[8] in issue in this proceeding are unconstitutional and that the courts of those

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6. (Cont'd)

them by the legislature. As long as the statute is unconstitutional, however, the State courts, and we because of incorporation, have no choice but to permit inheritance, or in the Social Security context, to order the award of benefits. See Mathews v. Lucas, 427 U.S. 495, 515 n.18 (1976); Fulton v. Harris, No. 80-1887 (8th Cir. Sept. 15, 1981); White v. Harris, 504 F.Supp. 153 (C.D. Ill. 1980); Ramon v. Califano, 493 F.Supp. 158 (W.D. Tex. 1980); Allen v. Califano, 456 F.Supp. 168 (D. Md. 1978).

7. The Mississippi statutes provided as follows:

> If any man beget a child or children by a woman whom he shall afterward marry, such child or children, if acknowledged by the man, shall, in virtue of such mar-
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> (fn. cont.)

States would so hold. Such a holding establishes that the children, in fact, are entitled to inherit under State law and a fortiori, that the Secretary erred in denying them benefits they are thus entitled to receive under § 202(d).

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7. (Cont'd)

> riage and acknowledgement, be legitimate and capable in law to inherit and transmit inheritance as if born in wedlock.

Miss. Code Ann. § 91-1-15.

> The court, on the date of the entering of such order of paternity, if the father of the child is unmarried and could lawfully have consummated a marriage with the mother of the child under the laws of this state, may adjudicate in such order that the child shall inherit from the father as could a natural child of the father under the statutes of descent and distribution.

Id. § 93-9-29(5).

8. The West Virginia statute states:

> If a man, having had a child or children by a woman, shall after-
>
> (fn. cont.)

In Trimble v. Gordon, 430 U.S. 762 (1977), the Supreme Court invalidated an Illinois statute which permitted an illegitimate child to share in the inheritance of his mother's intestate estate, but restricted inheritance from the father to cases in which the father subsequently married the mother and acknowledged the child as his own. Legitimate children, by contrast, were entitled to inherit from both parents without limitation.

Although the Court refrained from holding that legitimacy is a suspect classification, it did indicate that the scrutiny of a State's interest in, and

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8. (Cont'd)

> wards intermarry wth her, such child or children, or their descendants, shall be deemed legitimate.

W.Va. Code § 42-1-6.

purpose for, the classification "is not a toothless one." Id. at 767, quoting Mathews v. Lucas, 427 U.S. 495 (1970). On the authority of Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), the Court rejected the proffered interest in promoting licit family relationships, noting that disadvantages heaped upon the innocent offspring of an illicit coupling bore little, if any, relationship to the asserted State interest. In addition, the Court was unpersuaded by other arguments advanced by the State, including its generally legitimate interest in providing for an orderly disposition of property at death. The defect in the Illinois scheme, observed Justice Powell, was that it failed to distinguish between categories of illegitimate children.

In broadly denying illegitimates the right to inherit from their fathers, the statute was found to extend far beyond a permissible purpose. Finally, the Court also rejected the related claims that the decedent could have avoided this problem by leaving a will and that in the absence of a will, the presumed intent of the decedent was to leave his property in accordance with the statutory scheme.[9] Thus finding no justification for the discrimination between

9. That the decedent could have left a will was of no constitutional significance, said the Court. Such a course of action by the decedent would eliminate the reason for the challenge to the statute, but the existence of such an alternative is of no use in demonstrating the constitutionality of the intestate succession scheme. 430 U.S. at 773-74. The argument as to the presumed intent of the decedent was rejected on the ground that this asserted purpose, in fact, was not a purpose of the Illinois legislature. Id. at 775-76.

legitimate and illegitimate children, the statute was held violative of the Equal Protection Clause.

One year later, the Court upheld a New York statute which did not treat legitimate and illegitimate children identically. Lalli v. Lalli, 439 U.S. 259 (1978). The statute in Lalli provided that a bastard could inherit from his father if a court of competent jurisdiction, acting during the lifetime of the father, had entered an order of filiation. As a further limitation, the statute required the proceeding to be instituted either during the mother's pregnancy or within two years of the child's birth. Id. at 262. Because the State has a legitimate and substantial interest in the orderly disposition of its residents' property, and because special problems of proof arise in

establishing paternity, particularly after the father's death, the Court concluded that the New York statute was an appropriate constitutional vehicle for satisfying the the State's interests.

Despite the protestations of four dissenting Justices, see id. at 277 (Brennan, J., dissenting), the Court found New York's statute distinguishable from the one in issue in Trimble. Rather than erecting an absolute bar to inheritance the Court noted that New York had followed a more flexible course, thus permitting many illegitimate children to escape the absolute bar. In addition, the Court observed that the New York statute was related directly to the primary goal of providing for an orderly disposition of property, and that the statutory standard dealt only with the practical problems

of proof. Finally, the Court noted that the marital status of the parents was irrelevant. Id. at 267.

Reading both Trimble and Lalli together, it is clear that the States do have sufficient grounds to warrant imposing somewhat higher burdens on illegitimate children. These interests, however, have bounds. While a State may require particularized proof of paternity in order to prevent spurious claims to the estate of a male decedent, it may not erect an absolute bar. Nor may it follow a course in which the child -- who all recognize has done no wrong -- is powerless to act in furtherance of his interests in establishing paternity.

I therefore believe that the statutes now before us share the defects described by the Court in Trimble and that if asked today, the courts in both

West Virginia and Mississippi, would be obliged to find them unconsititutional. Mississippi's statute[10] permits illegitimate children to inherit from their father in two instances. Either the parties can subsequently marry and the father can acknowledge the child as his own, Miss. Code Ann. § 91-1-15, or a court may issue a decree of paternity and further order that the child be entitled to inherit from his father. This latter option may be exercised, however, only if the father is unmarried

10. Since this litigation began, Mississippi amended its statute in a way which arguably permits the Jones children to qualify as intestate heirs. Because of this amendment, which appears to be retroactive, I would remand No. 81-1080 for reconsideration by the Secretary. The majority, however, limits their discussion to the old statute and to the extent this statute is found to be the basis for denying the children benefits, I would hold it unconstitutional.

and if the parents have the capacity to marry under Mississippi law. Id. §§ 93-9-9, 93-9-29(5). In accordance with West Virginia law, an illegitimate child may inherit only if his parents intermarry.

No discussion of Mississippi's first alternative is necessary. In its material terms, it is identical to the statute struck down in Trimble and thus is plainly unconstitutional. Mississippi's second alternative, and West Virginia's provision, also must fall. Neither statute provides a reasonable ground upon which an illegitimate child may base a claim to a share of his father's intestate estate. Instead, a barrier is erected which may be surmounted only by the parents having the capacity to marry and/or subsequent inter-marriage -- events over which the

child has no control. Moreover, in erecting this bar, it is evident that the State's interest in enforcing its statute is more attuned to the desire to deter illicit activity by the parents -- which is pursued illogically by visiting their sins upon the innocent child -- than to a legitimate, substantial interest in providing for the orderly disposition of its decedents' property as was intended under the New York statute. Finding no proper State interest served by these legislative provisions, the conclusion that they are unconstitutional is compelled.

III

In view of the instant majority's assertions that a consideration of the unconstitutionality of the State law is

inconsistent with Congress' design in enacting § 216(h)(2)(A), I feel constrained to point out that "the primary purpose of the contested Social Security scheme is to provide support for dependents of a [dead or] disabled wage earner." Jiminez v. Weinberger, 417 U.S. 628, 634 (1974). Congress utilized this scheme requiring reference to State law simply because it believed that it would be an effective, facile way of determining who was "dependent" and thus entitled to benefits. There has never been a desire evinced by Congress to erect barriers blocking children from receipt of benefits on account of their parents' death or disability. Indeed, in the 1965 Social Security amendments, Congress explicitly chose to add additional provisions, apart from § 216(h)

(2)(A), in order to make certain that the class of children likely to be dependents was as broad as necessary to encompass all legitimate claims.[11]

Thus it is evident that the majority's decision today actually frustrates the congressional purpose.[12] Rather than continuing to penalize the

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11. See S.Rep. No. 404, 89th Cong., 1st Sess. 106-07, reprinted in [1965] U.S. Code Cong. & Ad. News 1943, 2049-50.

12. This course is all the more regrettable in light of the Supreme Court's recent comments in Ridgway v. Ridgway, 50 U.S.L.W. 4006 (1981). The Court, acknowledging that Federal law plays a limited role in domestic relations, said nevertheless that "this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." Id. at 4008. By the same token, these patently unconstitutional State intestate succession schemes ought not to be used to subvert Congress' expressed policy to accord benefits to the Jones children and Marcia Simms.

children for their parents' actions, I would hold the State statutes, as incorporated into Federal law, unconstitutional and direct the Secretary to honor their claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALBERT A. JONES, A MINOR CHILD; and BRIDGET JONES, A MINOR CHILD, By Their Mother and Next Friend, Albertine Jones; and BARBARA L. JONES	:	
v.		CIVIL ACTION NO. Y78-2537
PATRICIA R. HARRIS, Secretary, Department of Health and Human Services[1]	:	

MEMORANDUM

This action was brought pursuant to 42 U.S.C. § 405(g) to review a final decision of the Secretary of the Department of Health and Human Services.

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1 Patricia R. Harris has succeeded Joseph A. Califano, Jr. as Secretary of Health and Human Services (successor to the Department of Health, Education and Welfare as of May 4, 1980), and, pursuant to 42 U.S.C. § 405(g)(1976), the appropriate substitution has been made.

The plaintiffs are a mother, Albertine Jones, and her three children, Bridget Jones, Albert A Jones, and Barbara L. Jones. Albert and Bridget are minors, thus the suit was prosecuted by Albertine, their mother and next friend. Barbara, at the time of the filing of the action, was 18 years of age and therefore is a plaintiff in her own right. The plaintiffs claim that the three children are entitled to children's insurance benefits on the account of Odes Watson, their father. There is really no dispute about the fact that Odes Watson was the biological father of the children and the Administrative Law Judge implicitly so found. (Tr. 58). The inquiry does not stop there, however, since the father and mother were never married.

Under the Social Security Act an illegitimate child of a deceased wage earner is entitled to child's insurance benefits only if the child meets one of the following criteria:

1. He would be entitled to inherit personal property from the deceased wage earner under the intestacy statutes of the wage earner's state of domicile at death. 42 U.S.C. § 416(h)(2)(A); 20 C.F.R. § 404.355(a);

2. The other parent of the child married the wage earner, but due to a legal impediment, the marriage was invalid. 42 U.S.C. § 416(h)(2)(B); 20 C.F.R. § 404.355(b);

3. The wage earner prior to his death had (a) acknowledged the child as his son or daughter in writing, (b) been decreed by a court to be the child's parent, or (c) been ordered by a court to contribute to the support of the

child on the basis of parenthood. 42 U.S.C. § 416(h)(3)(C)(i); 20 C.F.R § 404.355(c);

4. At the time of the wage earner's death, he was living with or contributing to the support of the child, and the Secretary is convinced that the claimant is in fact the son or daughter of the wage earner. 42 U.S.C. § 416(h)(3)(C)(ii); 20 C.F.R. § 404.355 (d).

The plaintiffs in this action claim the right to insurance benefits under the theory that their father was contributing to their support at the time of his death. Alternatively, they claim that the intestacy laws of the State of Mississippi which prohibit them form inheriting from their father are unconstitutional and that they are thereby

entitled to benefits under the rationale of Allen v. Califano, 456 F.Supp. 168 (D.Md. 1978).

The Administrative Law Judge found that the evidence was insufficient to show that the father was contributing to the support of the children at the time of his death. The plaintiffs claim that the Administrative Law Judge erred in several ways.

Plaintiffs claim that there was not substantial evidence to support the Administrative Law Judge's decision that Odes Watson did not support the children and, further, that the Administrative Law Judge improperly applied the statutory standard of support.

At the hearing the mother and three children all testified in substantially the same manner, i.e., that the deceased wage earner contributed substantial amounts of money and support to the

children. It was testified that he contributed $20.00 to $25.00 a week for food which he allegedly purchased himself and also gave the plaintiff money from time to time. The children testified that he also gave them money on occasion. This testimony is supported by affidavits of Mr. Watson's sister (Tr. 182, 210). Miss Jones also testified that the wage earner paid the children's expenses when they were born and that he paid their doctor bills. On the other hand, the claimant made other statements which contradicted her testimony, e.g., she stated previously that Mr. Watson had never contributed to the support of the children; she later changed that statement to say he gave her only about $5.00 to $10.00 per year and that she did not consider that enough to care for the children which was why she made the previous statement that he never support

them. (Tr. 186). She further answered a Social Security questionnarie on which she answered "no" to the question, "Did the worker accept responsible for or pay the child's hospital expenses at birth or did he give the information for the child's birth certificate?"

The plaintiffs' arguments with regard to the Administrative Law Judge's interpretation of the word "support" is derived from his statement that, "any other benefit he may have supplied, such as the purchase of an article of clothes or providing personal services, was only done by chance, and was not in consideration of being regular support payments." Because the use of the word "payments" by the Administrative Law Judge, the plaintiffs claim that the Administrative Law Judge did not consider contributions

in kind. A fair reading of his findings does not support this conclusion. (Tr. 58).

The Administrative Law Judge found the testimony of the mother and three children to be confusing, contradictory, and unconvincing. He found the written statement of the claimant in 1975 convincing wherein she stated that the wage earner gave her $5.00 to $10.00 total a year for the children and nothing after early 1972. (Tr. 57).

Although the testimony of Miss Jones and her children does not seem confusing to this Court, there were contradictions in the testimony and Miss Jones' testimony was clearly contradicted by her prior inconsistent statements. In light of this fact and the fact that the Administrative Law Judge had the opportunity to observe the

demeanor of the witnesses and judge their credibility, this Court cannot substitute its judgment for that of the Secretary on questions of credibility. The resolution of the conflicts in the evidence is for the Secretary and not for the reviewing court. Richardson v. Perales, 402 U.S. 389 (1971). Since all of the testimony revolved around the time prior to Mr. Watson's disability and since the Court has determined that he did not support the children prior to his disability, the fact that he clearly did not support them after his disability is irrelevant. Accordingly, there is substantial evidence to support the Secretary's finding that Mr. Watson was not contributing to the support of the children, either at the time of his disability or at the time of his death.

The claimants alternately seek remand of the case based on the Adminis-

trative Law Judge's alleged improperly restricting of the statutory and regulatory meaning of support and his failure to make any findings on the issue of food and clothing. It is argued that "because of the ALJ's failure to evaluate the testimony and corroborating evidence of Mr. Watson's provison of food and clothing for the children, the court is forced to speculate as to the ALJ's reasons." This argument is without merit. The Administrative Law Judge clearly set forth in his opinion that he did not believe the testimony given at the hearing in light of all of the circumstances, (Tr. 57), and gave his reasons for finding that Mr. Watson had not contributed to the support of the children. (Tr. 58).

The plaintiffs also claim that they are entitled to surviving child's benefits because the intestate succession

laws of Mississippi are unconstitutional. The Mississippi intestate succession statute permits illegitimate children to inherit from their mother, but not from their father except in two instances. Mississippi Code Annotated, § 91-1-15 (1973). The first instance is where the parents subsequently marry and the father acknowledges the children as his own. See Thomas v. Thomas, 200 Miss. 96, 25 S.2d 710 (1946); Hulitt v. Jones, 220 Miss. 827, 72 S.2d 204 (1954). The second exception is whether a court has determined that the man is the father of the children and has ordered that the children shall inherit from the father to the same extent as legitimate children. This can only be done where the father is unmarried and the father and mother could marry each other under the laws of Mississippi. Mississippi Code Annotated, §§ 93-9-9, 93-9-29(5)(1973).

Plaintiffs argue that the Supreme Court's decision in Trimble v. Gordon, 403 U.S. 762 (1977), clearly establishes that this statutory scheme is unconstitutional. In that case the Court struck down an Illinois statute which provided that an illegitimate child could inherit only through his mother unless the parents married and the father acknowledged the child as his own.

In the instant case a judicial determination of the constitutional question is unncessary. Even assuming arguendo that the Mississippi statute is deemed unconstitutional, such a finding would not erase the fact that 42 U.S.C. § 416(h) provides alternate means for an illegitmate child to establish the requisite dependency.

The Administrative Law Judge applied these criteria to the plaintiff's claim and determined that the children

were not in fact eligible for child insurance benefits under any of the available alternatives. (Tr. 29). The applicable provisions are beyond constitutional challenge, as the Supreme Court has already held them to be valid. Matthews v. Lucas, 427 U.S. 495 (1976).

Having determined that the administrative findings were supported by substantial evidence, the Secretary's motion for summary judgment will be granted by separate Order.

Dated November 20, 1980

Joseph H. Young
United States
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALBERT A. JONES, A MINOR CHILD; and BRIDGET JONES, A MINOR CHILD, By Their Mother and Next Friend, Albertine Jones; and BARBARA L. JONES	:	
v.	:	CIVIL ACTION NO. Y78-2537
PATRICIA R. HARRIS, Secretary, Department of Health and Human Services	:	

O R D E R

For the reasons stated in the foregoing Memorandum, it is this 20th day of November, 1980, by the United States District Court for the District of Maryland, ORDERED:

1. That the defendant's motion for summary judgment BE, and the same hereby IS, GRANTED.

2. That the plaintiff's motion for summary judgment BE, and the same hereby IS, DENIED.

3. That the Clerk forward copies of this Order and the foregoing Memorandum to counsel for the parties.

_____
Joseph H. Young
United States District
Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARCIA SIMMS, a minor by her next friend, Sheila Simms	:	
vs.	:	CIVIL ACTION NO. Y79-844
PATRICIA R. HARRIS, Secretary, Department of Health and Human Services[1]	:	

MEMORANDUM

Plaintiff[2], Sheila Simms, filed this action pursuant to 42 U.S.C. §405(g)

---

1 Patricia r. Harris has succeeded Joseph A. Califano, Jr. as Secretary of Health and Human Services (successor to the Department of Health, Education and Welfare as of May 4, 1980), and, pursuant to 42 U.S.C. § 405(g)(1976), the appropriate substitution has been made.

2. "Plaintiff" hereinafter refers to Sheila Simms, bringing this action as mother and next friend of claimant Marcia Simms, a minor.

for review of a final decision by defendant, the Secretary of the Department of Health and Human Services, denying Social Security benefits to Marcia Simms, her minor child, as a dependent of a deceased insured wage earner. The case is presently pending on cross motions for summary judgment on which no hearing is deemed necessary at this time. Local Rule 6.

Plaintiff applied for benefits on August 26, 1977. (Tr. 133-36). The application was denied both initially and on reconsideration. (Tr. 138-39; 141-44). A hearing was requested and held before an administrative law judge, who denied benefits on December 8, 1978. (Tr. 30). The Appeals Council affirmed on March 9, 1979, (Tr. 3-4), thus constituting the final decision of the Secretary for purposes of this review.

The facts can be summarized as follows. Talmadge Meadows, the deceased insured wage earner, met the plaintiff on a blind date in November, 1970. (Tr. 25). At the time he was a West Virginia resident serving in the Army, stationed at Fort Holabird in Baltimore, Maryland. (Tr. 29). Mr. Meadows and Ms. Simms began to date regularly and became intimate. (Tr. 25). After the wage earner moved from the Army barracks to an apartment, plaintiff would visit him there often, although she continued to reside with her parents. (Tr. 25). On approximately June 21, 1971, Ms. Simms became pregnant. (Tr. 25). At the hearing she denied having had intercourse with anyone but Mr. Meadows during the critical time. (Tr. 25, 70, 96). She further testified thar she informed the wage earner of her condition and that

they discussed marrying after his discharge from the Army. (Tr. 25, 74-75). Ms. Simms' friend, Marion White, was present when the wage earner was informed of the pregnancy, and she asserted that he did not deny paternity. (Tr. 25, 71, 73-74). In August, 1971, Mr. Meadows died from a non-military gunshot wound. (Tr. 149). The child was born on March 5, 1972, (Tr. 25), and plaintiff had Mr. Meadows' name placed on the birth certificate as the father. (Tr. 25, 152).

An individual is entitled to child's insurance benefits under 42 U.S.C. § 402(d) if he meets the age, filing, non-marriage, and non-adoption by others requirements of that section. In addition, the claimant must be dependent upon the wage earner at the time of his death. 42 U.S.C. § 402(d)(1)(C)(ii). Under 42 U.S.C. § 402(d)(3) a child is

"deemed dependent" if he was living with or supported by the wage earner at the time of his death or is the "legitimate" child of the wage earner. In order for an illegitimate child to establish the requisite dependency, he must meet one of the four following statutory requirements:

1. He would be entitled to inherit personal property from the deceased wage earner under the intestacy statutes of the wage earner's state of domicile at death. 42 U.S.C. § 416(h)(2)(A); 20 C.F.R. § 404.355(a);

2. The other parent of the child married the wage earner, but due to a legal impediment, the marriage was invalid. 42 U.S.C. § 416(h)(2)(B); 20 C.F.R. §404.355(b);

3. The wage earner prior to his death had (a) acknowledged the child as his son or daughter in writing, (b) been

decreed by a court to be the child's parent, or (c) been ordered by a court to contribute to the support of the child on the basis of parenthood. 42 U.S.C. § 416(h)(3)(C)(i); 20 C.F.R. § 404.355(c);

4. At the time of the wage earner's death, he was living with or contributing to the support of the child, and the Secretary is convinced that the claimant is in fact the son or daughter of the wage earner. 42 U.S.C. § 416(h)(3)(C)(ii); 20 C.F.R. § 404.355 (d).

The Administrative Law Judge concluded from the evidence presented that Mr. Meadows was the father of Marcia Simms. (Tr. 26). However, he denied survivor's benefits based on his findings indicating that none of the aforementioned statutory requirements were met. (Tr. 29-30).

Plaintiff contends that Marcia Simms is entitled to child insurance benefits based on the fact that (1) the wage earner's contributions to the unborn child were commensurate with her needs at the time of his death, and (2) the West Virginia intestacy statute, in this case incorporated into 42 U.S.C. § 416(h)(2)(A), is violative of the Fifth Amendment guarantees of due process and equal protection by failing to provide a rational basis for discriminating between legitimate and illegitimate children.

I.

The Administrative Law Judge concluded from the evidence presented in this case that the wage earner was not living with or contributing to the support of plaintiff's child as contem-

plated under 42 U.S.C. § 416(h)(3)(C)(ii). (Tr. 29). In making this determination, he found that the $10.00 to $15.00 per month, which plaintiff testified the wage earner had given her and which was not altered in amount or frequency after his knowledge of the pregnancy, was "in the nature of a small gift." (Tr. 28). He indicated that, unlike the mother in Adams v. Weinberger, 521 F.2d 656 (2d Cir. 1975), plaintiff was living at home with her parents, supported by her own wages and welfare benefits. (Tr. 28).

The purpose of this review is not to weigh evidence and resolve conflicts therein, or to substitute the view of this Court for that of the Secretary, but rather to determine whether there is substantial evidence to support the Secretary's conclusion. See 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S.

389 (1971). The burden was on the plaintiff to show her child's dependency on the wage earner by showing contributions for support commensurate with the needs of the unborn child. See, e.g., 20 C.F.R. § 404.366; Adams v. Weinberger, supra. Obviously, in a case in which a father dies so early in the mother's pregnancy, this burden is a difficult one to meet. However, this evidentiary problem does not justify awarding benefits based on 42 U.S.C. § 416(h)(3)(C)(ii) absent any proof of the child's dependency or anticipated dependency other than what the Administrative Law Judge referred to as "a vague promise of future marriage" made to the mother. (Tr. 28).

In cases in which a child who was born after the father's death seeks benefits, courts look to the support of the mother as an indication of the

child's anticipated dependency. See Adams v. Weinberger, supra; Wagner v. Finch, 413 F.2d 267 (5th Cir. 1969). There was sufficient evidence to support the Secretary's conclusion that the money and other gifts given to plaintiff during their relationship were not contributions to her support and, accordingly, plaintiff has not established proof of dependency under that section of the Act.

II.

Plaintiff's second contention is that the Social Security Act's incorporation of the West Virginia intestacy statute, as it relates to illegitimates, is violative of the Fifth Amendment guarantees of due process and equal protection.

In the instant case a judicial determination of the constitutional question is unnecessary. Even assuming arguendo that the West Virginia statute is deemed unconstitutional, such a finding would not erase the fact that 42 U.S.C. § 416(h) provides alternate means for an illegitimate child to establish the requisite dependency.

The Administrative Law Judge applied these criteria to the plaintiff's claim and determined that her daughter was not in fact eligible for child insurance benefits under any of the available alternatives. (Tr. 29). The applicable provisions are beyond constitutional challenge, as the Supreme Court has already held them to be valid. Matthews v. Lucas, 427 U.S. 495 (1976).

Having determined that the administrative findings were supported by substantial evidence, the Secretary's

motion for summary judgment will be granted by separate Order.

Dated November 20, 1980

Joseph H. Young
United States
District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARCIA SIMMS, a minor by her next friend, Sheila Simms	:	
vs.	:	CIVIL ACTION NO. Y79-844
PATRICIA R. HARRIS, Secretary, Department of Health and Human Services	:	

O R D E R

For the reasons stated in the foregoing Memorandum, it is this 20th day of November, 1980, by the United States District Court for the District of Maryland, ORDERED:

1. That the defendant's motion for summary judgment BE, and the same hereby IS, GRANTED.

2. That the plaintiff's motion for summary judgment BE, and the same hereby IS, DENIED.

3. That the Clerk forward copies of this Order and the foregoing Memorandum to counsel for the parties.

Joseph H. Young
United States
District Judge

APPENDIX F

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of

Albertine Jones for Albert A. Jones,
Bridget Jones, and Barbara L. Jones

(Claimant)

Odes Watson

(Wage Earner)

Claim for

Child's Insurance Benefits

425-32-2470

(Social Security Number)

TO: Albertine Jones for Albert A.,
Bridget, and Barbara L. Jones
2223 East Fayette Street
Baltimore, Maryland 21231

ADVERSE PARTY

Minnie B. Watson
1558 Alter Road
Detroit, Michigan 48215

Albertine Jones (the claimant), who is acting on behalf of Albert A. Jones, Bridget Jones and Barbara L. Jones, (the children) is represented by Eileen Franch, Esquire, of the Legal Aid Bureau (no fee will be charged).

On August 26, 1976, the claimant filed an application for surviving child's insurance benefits on behalf of Bridget, born March 16, 1961, Albert, November 22, 1966, and Barbara, July 6, 1959, and alleged that Odes Watson, (the wage earner) was the father of the children.

Minnie B. Watson (the adverse party) has been receiving widow's benefits on the wage record of the deceased wage earner, and she was made a party to these proceedings by an Order dated February 1,

1978. She was unable to attend the hearing, and she is deemed to have requested a decision on the record.

The wage earner was born on August 13, 1913, and died on April 22, 1975. He lived his entire life in Mississippi.

This case is before the Administrative Law Judge upon a request for hearing filed by the claimant on behalf of the children. The claimant is dissatisfied with the prior determination disallowing the application for child's insurance benefits on the wage record of the deceased wage earner.

ISSUES

The general issue before the Administrative Law Judge is whether the claimant, on behalf of the children, is entitled

to child's insurance benefits under section 202(d) of the Social Security Act, as amended, on the earnings record of the deceased wage earner. The specific issues are where the wage earner was domiciled at the time of his death, whether the claimant was the biological child of the wage earner, whether the claimant was the legitimate child of the wage earner under either the law of the state of his domicile at the time of his death or the Social Security Act whether the claimant was entitled to devolution of the wage earner's intestate personal property under the law of the state of domicile at the time of his death, whether the claimant was living with or receiving support from the wage earner at the time of his death, and whether the wage earner was either currently or fully insured at the time of his death.

LAW AND REGULATION

Section 214 of the Social Security Act states:

> (a) The term "fully insured individual" means any individual who had not less than -
>
> (1) one quarter or coverage (whenever acquired) for each calendar year elapsing after 1950 (or, if later, the year in which he attained age 21) and before the year in which he died or (if earlier) the year in which he attained age 62, except that in no case shall an individual be a fully insured individual unless he has at least 6 quarters of coverage; or
>
> (2) 40 quarters of coverage; or
>
> (3) in the case of an individual who died before 1951, 6 quarters of coverage;
>
> not counting as an elapsed year for purposes of paragraph (1) any year any part of which was included in a period of disability (as defined in section 216(i)).

Section 202(d) of the Social Security Act as pertinent states:

> (d)(1) Every child of an individual who dies a fully or currently insured individual, if such child -

(A) has filed application for child's insurance benefits,
(B) at the time such application was filed was unmarried and
(i) had not attained the age of 18...and
(C) was dependent upon such individual ...
(ii) if such individual has died, at the time of such death, shall be entitled to a child's insurance benefit for each month, beginning with the first month after August, 1950 in which such child becomes so.

(d)(3) A child shall be deemed dependent upon his father...at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and

(A) such child is neither the legitimate nor adopted child of such individual, or
(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 216(h)(2)(B) or section 216 (h)(3) shall be deemed to be the legitimate child of such individual.

Section 216(h) of the Act as pertinent states:

(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property...by the courts of the State in which he was domiciled at the time of his death... Applicants who according to such law wold have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

(C) in the case of a deceased individual -

(i) such insured individual -

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered the evidence in the case, which includes all the testimony at the hearing, and the exhibits described in the List of Exhibits attached to this decision, and has also reviewed the Supplemental Memorandum filed by counsel.

EVALUATION OF THE EVIDENCE

The claimant testified that she never lived with the wage earner in Mississippi. The claimant lived with her mother until 1965, and then lived alone with the children until October 3, 1973, when she and her children came to Baltimore, Maryland, where they have since lived.

The evidence is clear that the wage earner supplied no money to the claimant or her children after they came to Baltimore in October, 1973.

In Mississippi the claimant received $82 a month aid for the children until she moved to Baltimore. At Baltimore she has received $210 a month benefits for the children.

The claimant testified that she visited the wage earner two or three times a week when she lived in Mississippi, that the wage earner bought food for her, that he gave money to the children, that he took the children to a beautician, and that he purchased shoes and clothing for the children.

The claimant was employed in Mississippi and has worked in Baltimore. The wage

earner was stated to have been hurt in 1972, and was never thereafter employed. The claimant did not keep in touch with the wage earner after she moved to Baltimore, although she visited Mississippi twice, when she saw the wage earner for a brief time, in July 1974 and at Christmas time in 1974.

The adverse party has submitted several letters, which indicate that the wage earner was age 21 and she, 18, when they were married, that they had two daughters, and that they were separated. The adverse party has no other knowledge nor was she ever told by the wage earner or anyone else that he was father of the claimant's children.

There is a statement from Olivia Anderson, the maternal aunt of the children, who lives in Baltimore, that the wage

earner contributed money to the children, and bought clothes and shoes now and then (it is not shown when these contributions were made). In an earlier statement, dated August 18, 1975, Olivia Anderson only states that the wage earner gave the children a little money when they were very small.

The claimant's statement indicates that the wage earner became disabled in 1972 and had to stop his contributions; the wage earner earned about $65 a week before his injury. Elnora Page, a sister of the claimant, has written that the wage earner stated that the children were his, and that he bought food and clothes for them and gave them money.

The claimant in an earlier statement said that the wage earner never contributed to the support of the children.

She later wrote that she actually received $5 or $10 a year during the five or six years that she knew him, and that because the amount was so small, that she did not consider this as "contributing to the support of the children", which was the reason for her earlier negative statement.

Counsel presented an affidavit from Jessie Brown, the claimant's mother, who affirmed that the wage earner referred to the children as being his, and that he often bought them clothes and shoes and gave them money.

DISCUSSION

Because of the complexity of the sections involved, it is important to synthesize our understanding of the pertinent provisions of the Social

Security Act. A child is entitled to benefits, if at the time of the insured event, the child was "dependent" upon the insured individual. Legitimate and adopted children are "deemed dependent." Children of marriages which are invalid for specified reasons, and children who at specified times have been (a) acknowledged in writing by the insured individual, or (b) decreed by a court to be the child of an insured individual, or (c) the beneficiary of an order of court directing the insured individual to provide support are deemed to be the children of the insured individual, and are also "deemed legitimate" and thereby "deemed dependent." As an alternate means of showing eligibility for benefits, a child who at the time of the event insured against could inherit personalty through intestate succession by the laws of the insured's state of

domicile (with qualifications not pertinent) is deemed to be the child of the insured individual from whom he could inherit. Finally, where a child cannot show eligibility under any of the foregoing provisions, eligibility may be shown by evidence satisfactory to the Administrative Law Judge that the insured individual was the father of the child and lived with or contributed to the support of the child at the time of death.

In this case the issue resolves itself to whether the children could inherit personalty through intestate succession under the laws of Mississippi, the state of domicile of the wage earner at the time of his death, and if not, then whether the wage earner contributed to the support of the children at the time

of death. Answers to both premises are found to be in the negative.

The law of the state of the wage earner's domicile at the time of his death, Mississippi, provides that a child acquires the status of a child if the parents intermarry and the father acknowledges the child, or the chancery court, upon petition of father, has legitimated the child, or after June 30, 1962, the county, circuit, chancery, or family court expressly grants inheritance rights in paternity and support of child.

The children are not the legitimate or adopted children of the wage earner. There is no evidence of any writing of the wage earner acknowledging the children, nor of any court decree to that effect. The wage earner was not re-

quired to provide support by an order of court. The children are not eligible to inherit the personal property of the wage earner through intestate succession under the laws of Mississippi. Therefore, the last provision under which the children could become beneficiaries, to establish by satisfactory evidence that the wage earner was the father of the children and had lived with or contributed to the support of the children at the time of his death, will now be explored.

At the time of the birth of the children, the claimant was in her late twenties and the wage earner was in his early fifties. They never lived together as husband and wife. He had a wife living, although they were separated. There is evidence from both sides that he recognized the children as his own.

The only contrary evidence is from the separated wife to the effect that the wage earner was ruptured, which in her view rendered him impotent, and the further fact that he had never told her of these children. With this state of the evidence, we find that the wage earner was the biological father of the children. As the children never lived with him, we turn to the last and most important point, did the wage earner contribute to the support of the children at the time of his death.

The evidence is clear that the claimant was injured in 1972, and it appears from the earnings statement that the accident occurred in the early part of the year. In 1971, the claimant averaged $65. a week. The testimony reflects that he was injured on-the-job, in changing a tire on a farm truck; the claimant's

head was struck by the rim of an exploding wheel-tire. He thereafter was unable to work, and spent much of his time on his front porch; it is not known whether he received workmen's compensation or welfare benefits, but he was receiving social security disability insurance benefits at the time of his death, in the amount of $132.20 a month.

The testimony is clear that the wage earner gave no money to the claimant after his injury. It is also noted that the children at all times were the recipient of welfare support payments as well as the contributions of the claimant, who was employed both in Mississippi and in Maryland.

The testimony is conflicting as to what amounts of money was received. A statement of the claimant, signed on Decem-

ber 15, 1975, indicates that the total amount of money given to the children from 1967 to 1972 was $10.00. Earlier, on October 16, 1975, the claimant related that she was in error in stating that the wage earner had not contributed to the support of the children; in fact, the wage earner had contributed $5 or $10 a year to her for their support.

The testimony of the children relating to a time prior to 1972, when the children were at a tender age, and of the claimant relating to a time when she was employed in farm labor and at a dry cleaners, was confusing, contradictory, and unconvincing. The written testimony of the claimant, in 1975, is convincing; she stated that the wage earner gave her $5 to $10 total a year for the children, and nothing after early 1972.

The wage earner died in 1975; from early 1972 until his death, no money was paid--it is true that the wage earner's sister was the representative payee, Elmora Page, but she knew the parental status of the children, yet no contributions were made.

Based on the total evidence, the Administrative Law Judge finds that from the birth of the children until the wage earner's injury in 1972 that he made no contributions to the support of the children. He gave the claimant up to $5 or $10 a year, but this was not on a regular or periodic basis but was sporadic in nature, and was of a negligible amount. Any other benefit he may have supplied, such as the purchase of an article of clothes or providing personal services, was only done by chance, and was not in consideration of being regu-

lar support payments. Further, from early 1972 to the time of his death in 1975, the wage earner made no payments of any kind, although he had at least an income of $132 a month from his social security. The children have been fed and supported their entire life through welfare payments to the claimant and by contributions of the claimant from her employment income.

Although it appears to the Administrative Law Judge that the children are the biological children of the wage earner, mere oral acknowledgement of paternity is not enough to establish entitlement to benefits for an illegitimate child under the Social Security Act. The Administrative Law Judge therefore finds the claimant not entitled to child's insurance benefits on behalf of the

children under the earnings record of the deceased wage earner.

FINDINGS

The Administratve Law Judge makes the following findings:

1. The claimant filed an application on October 26, 1976, on behalf of her three children for child's insurance benefits on the wage record of the deceased wage earner.

2. At the time of his death the wage earner was domiciled in Mississippi.

3. There was no marriage ceremony resulting in the purported

marriage of the claimant and the wage earner.

4. The wage earner did not acknowledge in writing that the children were his children.

5. The wage earner was not decreed by a court to be the father of the children.

6. The wage earner was not ordered by a court to contribute to the support of the children.

7. At the time of his death, the wage earner was not contributing to the support of the children.

8. At the time of his death, the wage earner was not living with the children.

9. Under Mississippi State law in effect at the time of the wage earner's death, the claimant was neither the legitimate child of the wage earner nor entitled to inherit personalty from the wage earner through intestate succession.

10. The children are not entitled to child's insurance benefits on the earnings of the deceased wage earner.

DECISION

It is the decision of the Administrative Law Judge that based on the application

filed on October 26, 1976, the children, Albert A. Jones, Bridget Jones, and Barbara L. Jones, are not entitled to child's insurance benefits under Section 202(d) of the Social Security Act, as amended.

George W. Blaine
Administrative Law Judge
Bureau of Hearings
and Appeals
Room 415, The Rotunda
711 West 40th Street
Baltimore, Maryland
21211

Date: June 2, 1978

APPENDIX G

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of

Sheila Simms for Marcia Simms

(Claimant)

Talmadge I. Meadows

(Wage Earner)

Claim for

Child's Insurance Benefits

234-72-9418

(Social Security Number)

Interested Party:

Lillie M. Sherred for
John A. Sherred
434 Central Avenue
Mansfield, Ohio 44905

CLAIM FILE

Sheila A. Simms (the claimant) on behalf of her daughter, Marcia D. Simms (the child), filed an application on August 26, 1977, for child's insurance benefits on the earnings record of Talmadge I. Meadows (the wage earner), who was killed on August 11, 1971, while stationed at Fort Holabird, Maryland, as a soldier in the military service; the wage earner was domiciled in Beckley, West Virginia, at the time of his entry The hearing was held at Baltimore, Maryland, on November 22, 1978, when testimony was received from the claimant and the child. Thomas C. Geltner, Esquire, represents the claimant and the child.

Lillie M. Sherred, who is receiving child's insurance benefits on the application filed on August 20, 1971, on behalf of her son, John A. Sherred, who

was born out of wedlock and fathered by the wage earner, was made an adverse party by our ORDER on August 28, 1978.

ISSUES

The general issue before the Administrative Law Judge is whether the claimant, on behalf of the child, is entitled to child's insurance benefits under section 202(d) of the Social Security Act, as amended, on the earnings record of the deceased wage earner. The specific issues to be determined are whether the deceased wage earner had been decreed by a court to be the father of the child, or had been ordered by a court to contribute to the support of the child becuase the child was his child, or that the deceased wage earner is shown by evidence satisfactory to the Secretary

to have been the father of the child and was living with or was contributing to the support of the child at the time of the wage earner's death, or that the child would have the right under applicable State law to inherit intestate personal property from the deceased wage earner as his child.

LAW AND REGULATION

Section 202(d) of the Social Security Act as pertinent states:

> (d)(1) Every child of an individual who dies a fully or currently insured individual, if such child -
>
> (A) has filed application for child's insurance benefits,
> (B) at the time such application was filed was unmarried and
> (i) had not attained the age of 18...and
> (C) was dependent upon such individual ... (ii) if such individual has died, at the time of such death, shall be

entitled to a child's insurance benefit for each month, beginning with the first month after August, 1950 in which such child becomes so.

(d)(3) A child shall be deemed dependent upon his father...at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 216(h)(2)(B) or section 216 (h)(3) shall be deemed to be the legitimate child of such individual.

Section 216(h) of the Act as pertinent states:

(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property... by the courts of the State in which he was domiciled at the time of his

death... Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.
(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

(C) in the case of a deceased individual -
(i) such insured individual -
(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter, and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered the evidence in the case, which includes all the testimony at the hearing, the argument of counsel and the cases cited, and the exhibits described in the List of Exhibits attached to this decision.

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EVALUATION OF THE EVIDENCE

The claimant testified that she met the wage earner on a blind date in November 1970. She apparently had just given birth to a son, who is now age 8, who was fathered by John Satterfield, and who has not contributed to that child's support, except for one $7.00 contribution. She was then receiving monthly welfare benefits on behalf of the son and was also employed. She and the wage earner became sexually intimate, meeting three to five times a week at her parents home or at motels. In the summer of 1971 the wage earner rented an apartment in Dundalk, near his station, and the claimant would visit him there, usually traveling by bus, and she would usually return home by taxi. She states that she became pregnant on June 20,

1971, Father's Day, as she missed her next menstrual cycle. She states that she told the wage earner of the pregnancy and that he stated that when his army term was over that they would get married.

The wage earner was killed on August 11, 1971; the child was born on March 5, 1972. She denies having had intercourse with any other individual during the critical time.

The claimant had the wage earner's name listed on the birth certificate as the father of the child (Exhibit 10). Other documentary evidence shows that a girl friend of the claimant, Marion White, was the one that arranged the blind date, that she knew that the claimant and the wage earner were having sexual

relations, although she had never witnessed the act, and that she was present when the claimant told the wage earner that she was pregnant and that he did not deny the paternity (Exhibit 18). Somewhat confusing are the statements of the claimant and of Charlene Hill that Charlene Hill was the one who introduced the wage earner to the claimant (Exhibits 13, 15 and 33).

Based on the above cited evidence, the Administrative Law Judge concludes that there is no probative evidence to rebut the conclusion that the wage earner was the biological father of the child, and that standing alone the affirmative evidence is sufficient to support the finding that the wage earner was the biological father of the child (our finding of fact number one).

Because of the complexity of the sections involved, it is important to synthesize our understanding of the pertinent provisions of the Social Security Act.

A child is entitled to benefits, if at the time of the insured event, the child was "dependent" upon the insured individual. Legitimate and adopted children are "deemed dependent." Children of marriages which are invalid for specified reasons, and children who at specified times have been (a) acknowledged in writing by the insured individual, or (b) decreed by a court to be the child of an insured individual, or (c) the beneficiary of an order of court directing the insured individual to provide support are deemed to be the children of the insured individual, and are

also "deemed legitimate" and thereby "deemed dependent." There is no probative evidence to support an affirmative finding that the child meets the requirements of the Act relating to "deemed" dependency (our second finding of fact).

As an alternate means of showing eligibility for benefits, a child who at the time of the event insured against could inherit personality through intestate succession by the laws of the insured's state of domicile (with qualifications not pertinent) is deemed to be the child of the insured individual from whom he could inherit. The domicile of the wage earner is determined to be West Virginia, the State of his domicile at the time of his entering military service, and there is no probative evidence that the domi-

cile was ever changed. His body was returned to West Virginia, where he was buried. The law of West Virginia provides that an illegitimate child may inherit intestate from his father only if the parents intermarry. Thus, the child does not meet this requirement, as there is no purported marriage. Finally, where a child cannot show eligibility under any of the foregoing provisions, eligibility may be shown by evidence satisfactory to the Administrative Law Judge that the insured individual was the father of the child and lived with or contributed to the support of the child at time of death. We have already found that the wage earner was the biological father of the child, and as the child was posthumously born, and as the parents of the child did not at any time live together, the wage earner could not

be said to have lived with the child at the time of death.

This brings us to the main thrust of the claimant's case -- was the wage earner at the time of his death contributing to the support of the child within the terms of the Act?

The wage earner fathered a child, John A. Sherrod, born on February 1, 1969, to the adverse party, who tracked the wage earner down through military locations in Arizona, Georgia, San Francisco APO, and finally Ft. Holabird, Maryland. There is written evidence that the wage earner's Commanding Officer interceded, and that the wage earner promised to send the adverse party $40.00 a month for support of the Sherrod child (Exhibits 20, 25, and 26).

There is no written proof or corroborating testimony of any payment of money by the wage earner to the claimant, only her self-serving testimony, which is that when they would go shopping she would point out something that she liked, and that the wage earner, after he received his monthly pay, would give her $10 or $15, or sometimes less, and that she would spend this on herself, pay her parents rent, and buy her son something.

In the Social Security Ruling cited by counsel, SSR 68-22 (C.B. 1968 p. 66), the insured worker lived with and supported the mother during the pregnancy until his death, and it was held that the child was "in being" during the time of support, and that the living with and the supporting of the mother was equated

with the living with and the supporting of the child. A statement contained in the

Ruling is quoted as follows: "Similarly, the Social Security Administration holds that if a worker was, in fact, contributing to the support of the mother of an unborn child, he was contribuintg to the support of the child."

The claimant in a written statement (Exhibit 14) is quoted as follows:

> "He gave me money when I needed things; not really on a regular basis, just about $10 or 20 a month".

Later, on December 2, 1977, she relates as follows:

> "Mr. Meadows was not living with me at the time he died. He just gave me money sporadically. At that time I was living with my mother and I was employed myself. I doubt that this constituted one half support."

If we assume that the claimant did receive $10 or $15 dollars in June, and the same in July, but possibly did not in August, due to his death, we certainly do not conclude that this was support money. The testimony reflects that it was given when the claimant saw something that she wanted to buy, and the money was in the nature of a small gift. The claimant received her support from her wages and from the child's welfare benefits of $140. a month. There is no evidence of any change in the amount of money given, or the frequency, after there was knowledge of the pregnancy, or of any alternation in their relationship, other than a vague promise of future marriage.

In the decision cited by counsel, Adams Vs. Weinberger, the mother was main-

tained in a joint abode by the wage earner, and in addition received between $200 and $300 over a seven month period, plus $100 as a registration fee for a hospital room which he knew would be needed when the baby arrived.

We agree that a posthumous child is not foreclosed from benefits merely because he was not born prior to the wage earner's death. However, the alleged contributions in this case, in our judgement, were not commensurate with the needs of the unborn child at the time of the father's death. The mother was not living with the wage earner, but was living at home. She had used her own income for her support. There were no provisions made or contemplated for the expected medical needs of the mother or child.

There is no evidence that the wage earner made any efforts to have a military allotment for the child. His military pay at time of death was $249.90 a month (Exhibit 8). In Norton Vs. Richardson, a Maryland case cited by counsel, it was underscored that in the precedent cases cited there had clearly been some regular and continuous "living with" or "support by" the wage earner, which for some unavoidable reason was interrupted on the date of the wage earner's death. Here, there is no evidence of regular and continuous support, other than the small gifts set forth in the claimant's testimony, but otherwise unsupported by other evidence of record.

In light of the total record of evidence, we find that the small gifts

provided by the wage earner to the claimant at the time of his death were insufficient to meet the support requirements contemplated by the statute (our third finding of fact).

ADDITIONAL FINDINGS

The Administrative Law Judge makes the following additional findings:

1. The claimant filed an application on August 26, 1977, on behalf of the child for child's insurance benefits on the wage record of deceased wage earner.

2. At the time of his death, the wage earner's domicile was the State of West Virginia, al-

though he was stationed as a military personnel at Fort Holabird, Maryland.

3. There was no marriage ceremony resulting in the purported marriage of the claimant and the wage earner.

4. The wage earner did not acknowledge in writing that the child was his child.

5. The wage earner was not decreed by a court to be the father of the child.

6. The wage earner was not ordered by a court to contribute to the support of the child.

7. At the time of his death, the wage earner was not contributing to the support of the child.

8. At the time of his death, the wage earner was not living with the child.

9. Under West Virginia State law in effect at the time of the wage earner's death, the child was neither the legitimate child of the wage earner nor entitled to inherit personalty from the wage earner through intestate succession.

10. The child is not entitled to child's insurance benefits on the earnings of the deceased wage earner.

CLAIM FILE

DECISION

It is the decision of the Administrative Law Judge that based on the application filed on August 26, 1977, the child, Marcia Simms, is not entitled to child's insurance benefits under Section 202(d) of the Social Security Act, as amended.

George W. Blaine
Administative Law
Judge
Bureau of Hearings
and Appeals
Room 415, The Rotunda
711 West 40th Street
Baltimore, Maryland
21211

Date: December 8, 1978

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALBERT A. JONES, A MINOR CHILD; and BRIDGET JONES, A MINOR CHILD, By Their Mother and Next Friend, Albertine Jones; and BARBARA L. JONES *

v. CIVIL NO. Y-78-2537

PATRICIA R. HARRIS, Secretary, Department of Health and Human Services *

* * * * * * * * * * * *

JUDGMENT

In accordance with the Memorandum and Order of the Honorable Joseph H. Young filed November 20, 1980 in the above entitled case, it is

ORDERED AND ADJUDGED:

That Judgment be, and the same is, hereby entered in favor of defendant against plaintiffs.

Dated at Baltimore, Maryland this 24th day of November, 1980.

PAUL R. SCHLITZ, Clerk

BY: _____
R. Bruce McElhone
Deputy Clerk

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARCIA SIMMS, a minor by her next friend, Sheila Simms	:	
v.	:	CIVIL NO. Y-79-844
PATRICIA R. HARRIS, Secretary, Department of Health and Human Services	:	

* * * * * * *

JUDGMENT

In accordance with the Memorandum and Order of the Honorable Joseph H. Young filed November 20, 1980 in the above entitled case, it is

ORDERED AND ADJUDGED:

That Judgment be, and the same is, hereby entered in favor of defendant against plaintiff.

Dated at Baltimore, Maryland this 24th day of November, 1980.

PAUL R. SCHLITZ, Clerk

BY: _____

R. Bruce McElhone

Deputy Clerk

APPENDIX J

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1080

Albert A. Jones, etc., et al, Appellants,

versus

Richard S. Schweiker, etc., Appellee.

No. 81-1132

Marcia Simms, etc., Appellant,

versus

Richard S. Schweiker, etc., Appellee.

O R D E R

Upon consideration of appellants' petition for rehearing and suggestion for rehearing en banc, by counsel,

IT IS ORDERED that the petition for rehearing is is DENIED.

Judge Bryan dissents from denial.

A majority of the active judges did not vote in favor of rehearing en banc.

Judge Winter, Judge Butzner, and Judge Russell would have granted rehearing en banc.

For the Court

William K. Slate, II
CLERK

FILED
APR 5, 1982
U.S. Court of Appeals
Fourth Circuit